

HB 13-1307. Legal Description in Real Property Title Documents

By Reps. Kagan and Gardner

The Colorado Bar Association requests your support of HB 13-1307.

Prior Law:

Statutes:

- C.R.S. §38-35-109: All documents affecting title to real property may be recorded in the office of the county clerk and recorder of the county in which the real property is located.
- C.R.S. §30-10-408(1)(a)&(b): Every county clerk and recorder shall keep a grantor index and a grantee index, and shall make correct entries therein of every recorded document affecting real estate under the names of the grantors/grantees in alphabetical order.
- C.R.S. §30-10-406(3)(a): Unless a document does not meet the stated requirements for margins thereon, a clerk and recorder may not refuse to record it.
- C.R.S. §38-35-122: All recorded documents affecting title to real property "shall include as an aid to identification, immediately preceding or following the legal description of the property, the street address or comparable identifying numbers," and may also include as an aid to identification, the assessor's schedule number or parcel number. The legal description of the property will govern if any ambiguity or variance results from the inclusion of any such additional information. Failure to include any such additional information does not render the document ineffective or the title unmarketable if the legal description appears thereon.

Common Law (prior to Sender v. Cygan):

- When a document affecting title to real property is recorded with a flawed (missing or incorrect) legal description, but does contain other identifying information concerning the property:
 - (a) the parties to the document remain bound by the terms thereof; and
 - (b) all other persons and entities dealing with such property may be on "inquiry notice" that the recorded but flawed document affects title to such property.

Court decisions (prior to Sender v. Cygan) concerning such inquiry notice (and the actual effect of documents containing missing or inaccurate property identifying information) have been made on a case by case basis, with the particular facts of each case being determinative of whether or not the recorded document in question provided enough information to require a reasonable person to inquire further ("inquiry notice") as to the intent of the parties to the document and as to the real property affected by such document.

- Prior to the Sender v. Cygan decision, there was no rule that all documents missing a legal description, by their nature, are void, defective or invalid, and each case was decided based on its own facts.

Sender v. Cygan (In re Rivera)

In its June 4, 2012 decision in this case, the Colorado Supreme Court distinguished those cases where a faulty legal description was included in a recorded document from those cases where no legal description was included and held (among other things) that:

- "a recorded deed of trust that completely omits a legal description is defectively recorded";
- "a deed of trust that is recorded without any legal description . . . is void and therefore incapable of providing constructive notice of the encumbrance";
- "because the deed of trust . . . was defectively recorded, we cannot conclude that it triggered any duty to inquire"; and
- "Viewed as a whole, section 38-35-122 reflects that a valid deed of trust necessarily must contain a legal description."

This Legislation:

This legislation attempts to address the following issues which may have been created by the Sender v. Cygan decision:

- Colorado statutes provide that any document with proper margins will be recorded when submitted to a county clerk and recorder. Therefore, there is no such thing as the concept of a "defective", "void" or "invalid" recording; all words used in Sender v. Cygan.
- In legal terms, a defective, void or invalid recording is incapable of being fixed because, technically, such document does not exist in the public records. On the other hand, a flawed document could possibly be fixed by a recorded amendment thereto, thereby allowing the parties to confirm their original intentions (if all agree or if a court decides it is proper based on the facts of each case), rather than creating a new rule of law stating that the flawed document is of no legal consequences, as if it had never been prepared, executed or recorded in the first place.
- Colorado statutes require clerks and recorders to index real property recordings using grantor/grantee indexes and these indexes are the only legal/official way to search and determine real property titles in Colorado. Colorado statutes do not require (and have never required) clerks and recorders to maintain tract indexes. (A tract index is a type of index keyed to the particular legal description of a particular piece of real property and enables identification of the entire chain of title thereto by examining the index in which the particular piece of property is identified, rather than going from grantor to grantee throughout the entire chain of title.) This difference is fundamental to the issue being addressed by this legislation as follows:
- If a person with a unique name (Mr. Troy Unique) owns only one parcel of real property located in Arapahoe County and a deed of trust from Troy Unique to the Arapahoe County Public Trustee is recorded by the Arapahoe County Clerk and Recorder without a legal description, a street address or any other property identifying information, then:
 - (a) prior to the Sender v. Cygan decision and pursuant to Colorado statutes and common law, a title examiner locating such deed of trust in the grantor index of Arapahoe County may well be on notice that the deed of trust was intended to encumber Troy's sole property in Arapahoe County (and a Colorado Court could uphold that position based on the facts of the case) without having to refer to any legal description, address or any other property identifying information whatsoever in the recorded document; or
 - (b) pursuant to Sender v. Cygan, that document is unquestionably invalid, void and defectively recorded, leaving no ability for a court to determine whether or not a reasonable person would have made further inquiry based on this information, and leaving the parties and the courts with no option other than treating the document as if it had never existed.

This legislation clarifies that a failure to include a legal description on a document:

- does not necessarily render that document "defective", "invalid" or "void" upon its recording;
- is not necessarily determinative of whether that document, upon recording, would operate to require a reasonable person to make further inquiry upon examination thereof, thereby making that document valid against third parties acquiring an interest in such property (this issue would continue to be left to the courts to determine on a case by case basis per existing precedent); and
- will not, upon execution, necessarily determine the validity of such document between the parties to such document.

In other words, this legislation preserves the law which existed prior to Sender v. Cygan in that a failure to include a legal description in a document affecting title to real property will not automatically void that document. Instead, each party to such document, and/or other affected third parties obtaining an interest in the property purportedly affected by such document, will retain their respective ability to ask a court to determine the effectiveness of such document and otherwise enforce such document based on the facts of each case.

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